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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

JOHN S. BARNES CORPORATION,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, John S. Barnes Corporation, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit enforcing an order of the National Labor Relations Board.

OPINIONS BELOW

The court of appeals issued no opinion. Its order enforcing the Board's order is set forth in the Appendix to this petition at App. 1a. The Board's Decision and Order are reported at 180 NLRB No. 139, and are reproduced in the Appendix at App. 9a.

JURISDICTION

The judgment of the court of appeals, which is reproduced in the Appendix hereto at App. 2a-8a, was en-

tered on April 19, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The principal question presented is whether the court below properly held that an employer, formally charged with having committed unfair labor practices within the meaning of the National Labor Relations Act, committed a further unfair labor practice when its counsel, in advance of a scheduled NLRB hearing, interviewed certain of its employees in order to prepare the employer's defense to the charged unfair labor practices.[1]

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in

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[1] In addition, the following subsidiary question is presented:

Whether the court below erred in affirming the Board's findings that Petitioner violated Section 8(a)(3) of the National Labor Relations Act by discharging two employees, John L. Brown and Peter Roskopp, and by changing the working hours of two other employees, Sam LaSala and Clyde Edwards.

Should Petitioner's position be accepted with respect to the principal question, the Court may also deem it appropriate to review the subsidiary question. In order to preserve Petitioner's position with respect to the latter issue, it is specifically adverted to herein.

a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

SEC. 8(a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

* * * *

(5) to refuse to bargain collectively with the representatives of his employees . . .

* * * *

STATEMENT OF THE CASE

The General Counsel of the National Labor Relations Board issued a complaint against the Company, Petitioner herein, charging that the Company had committed unfair labor practices within the meaning of Sections 8(a)(1), 8(a)(3), and 8(a)(5) of the National Labor Relations Act. The complaint charged, *inter alia*, that the Company had unlawfully refused to bargain with Lodge No. 1553, International Association of Machinists, AFL-CIO ("the Union"); had discriminatorily discharged employees John L. Brown and Peter Roskopp, and had discriminatorily increased the hours of work of employees Sam LaSala and Clyde Edwards; and had threatened and unlawfully interrogated its employees, and engaged in surveillance of their union activities.

The refusal to bargain allegation in the complaint against the Company grew out of a demand for recognition by the Union, which the Company had refused. This

allegation placed in issue the Union's asserted majority status—an issue which, in turn, presented the question of whether a majority of the Company's employees had signed authorization cards designating the Union as their bargaining representative.

A hearing on the complaint against the Company was held before a Trial Examiner. In preparation for the hearing, the Company's attorneys interviewed a number of Company employees with respect to matters and issues raised by the complaint, particularly the question of whether they had signed union authorization cards.

The Board found that the Company violated Sections 8(a)(3) of the Act by discriminating against employees Brown, Roskopp, LaSala, and Edwards. It further found that the Company violated Section 8(a)(1) of the Act by, among other acts, its interviewing of employees in preparation for the unfair labor practice hearing.

The Board also found that the proof failed to establish that the Union was a duly designated bargaining agent of the Company's employees in an appropriate unit at the time the Union demanded recognition. Accordingly, the Board dismissed the complaint allegation that the Company had refused to bargain with the Union in violation of Section 8(a)(5).[2]

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[2] The Section 8(a)(5) allegation against the Company grew out of a demand for recognition which the Union made in June, 1965, and which the Company refused. Previously, in August, 1964, in a representation proceeding, the Union had lost a Board-conducted election among the Company's employees. Objections by the Union to the 1964 election had not been resolved when the Union made its 1965 recognition demand. The unfair labor practices proceeding below was consolidated with the unfinished representation proceeding, and the issues involved in both proceedings were tried together before the Board.

In the Decision and Order brought before the Court by this petition, the Board directed that a second election be held. The Union won the second election, and, on June 30, 1971, was certified by the Board as the bargaining representative of the Company's employees.

The court of appeals, without opinion, enforced the Board's findings against the Company. The jurisdiction of the court of appeals was predicated on Sections 10(e) and 10(f) of the National Labor Relations Act, as amended.

A. The Facts

1. *The Prehearing Interrogation of Employees*

The hearing before the Trial Examiner on the complaint against the Company began on November 3, 1965. On the day before, the Company called four employees to Plant Manager Stenberg's office. Each of the called employees had been subpoenaed by the NLRB General Counsel to testify at the hearing, and, pursuant to the General Counsel's instructions, had so informed the Company.

Present at the time, in addition to Stenberg, were attorneys Fahy and Holmstrom who were the Company's counsel at the hearing before the Trial Examiner. Stenberg introduced the employees, and told them that the attorneys wished to ask them a few questions. The four employees were told by the attorneys that the Company was attempting to find out what the "problem" was. One of the four employees, Sam LaSala, testified that he was advised at the outset by attorney Fahy that if he did not so choose, he did not have to answer the questions. With LaSala's consent, Fahy asked LaSala whether he had signed a union authorization card, and whether he had been threatened or promised benefits either to join or not to join the Union. LaSala replied in the negative. LaSala was also asked whether he believed the Company had engaged in the surveillance of a Union meeting, and, when he responded affirmatively, he was asked to name the persons who had done so. LaSala named Stenberg and a female companion—a reply which prompted considerable laughing and joking. Attorney Holmstrom then asked LaSala whether any reason existed for a change the Company had made in LaSala's work hours, and whether he

had been informed of the Company's reason. LaSala replied that he had not been given a reason.

Employees Madeline Stone and Betty Holton were asked by attorneys Fahy and Holmstrom whether, and under what circumstances, they had signed union authorization cards. Holton, who acknowledged signing a card, was asked the date she had done so. Holton also acknowledged that there were no "unpleasantries" during the interrogation. Employee Thomas Kruse was asked whether he had been interviewed by the Board, and the nature of the questions asked. Kruse testified about the interview: "I told them—there were questions about who my foreman was and about the inside of the shop, the general run of the shop and who it was under—it was jokingly. There was no pressure put on me at all."

2. *The Discharge of John L. Brown*

Employee John L. Brown was discharged on March 9, 1965, for violating a published Company rule prohibiting employees from leaving their work places during working hours. The rule had been operative since April 1, 1964. In January 1965, the Company republished the rule in the following form:

> *The Company rule remains:* Every employee is prohibited from leaving his place of work (except in the line of duty or with permission of his foreman) during working hours,—or from distracting or interfering with the work of another during working hours. The rule is *not* changed.

On the afternoon of the day preceeding Brown's discharge, Plant Manager Stenberg was on the manufacturing floor when he observed Brown, who was outside his department, talking for an extended period of time with two maintenance men. Brown was then 80-100 feet away from his work place.

The next morning Stenberg had foreman Burchett bring Brown to the office. Sternberg showed Brown the Com-

pany's "work station" rule, and Brown acknowledged his familiarity with it. Stenberg told Brown that he had seen him away from his place of work on the previous afternoon, and that he, Stenberg, knew of no justification for the matter. Brown, in turn, offered no explanation. Stenberg then told Brown that this was the "final straw" that the matter had been discussed with the Company's president, Svenson, and that it had been decided to terminate Brown. Brown was quiet, and asked only, "Am I fired?" Brown himself admitted that he offered no explanation for being away from his work station, testifying, "I didn't say nothing."

Prior to his discharge, Brown had been reprimanded a number of times, and had been warned that he might be discharged. The reprimands were delivered on March 20 and December 13, 1964, and on January 25 and February 25, 1965. On the latter date, Plant Manager Stenberg told Brown that "his place of work was the stock room and he was to refrain from leaving the stock room and going to any other part of the plant and from engaging employees in conversation"; that this was his "last warning"; and that the next time he was called into the office he "would be terminated."

Five employees other than Brown had been reprimanded for being away from their work stations. Four of the latter 5 employees were also warned that they would be discharged for a repetition of their conduct. In fact, the Company had discharged employees other than Brown for violating Company rules.

3. *The Discharge of Peter Roskopp*

On Monday, May 24, 1965, Plant Manager Stenberg and Supervisor Eric Johnson, were conversing on the production floor. Employee Roskopp "butted in," and announced that he was starting his vacation on Thursday. Stenberg reminded Roskopp that vacations were not started in the middle of the week, that they were ap-

proaching the end of the month with a holiday to be observed on the following Monday, and that every available person was needed to complete work on the month's shipments. Roskopp replied that he had previously been granted permission by Johnson to leave on Thursday, that he "had already made his plans," and that "he was going to go Thursday." Stenberg, however, told Roskopp to "wait until Saturday, go on Saturday, and then you can get the weekend and the holiday and go the next week."

When Stenberg remained adamant in his position, Roskopp became very loud, using "some pretty vulgar and vile language." He said, "You —— ——, you will be in court over this. I will take this to the N.L.R.B., you dumb son-of-a-bitch." Stenberg then told Rosskopp that they would discuss the matter further the next morning, and walked away. Roskopp's statements were overheard by other employees who were in the area.

The next morning, Stenberg told Roskopp that he was suspended for the day, pending a decision as to what action would be taken against him. Later that day Stenberg met with Svenson, the Company's president, and related the exact remarks that Roskopp had uttered the day before. Roskopp's employment record was reviewed. Svenson agreed that Roskopp should be discharged. Svenson also suggested that Stenberg write up the details of the matter in a memorandum, and that the memorandum should be handwritten so that the secretaries would not be embarrassed by the language Roskopp had used. Accordingly, Stenberg prepared such a memorandum that night at his home.

On Wednesday, May 26, Stenberg brought Roskopp to his office, told him of the decision that had been made, and discharged him.

Roskopp admitted that he got "angry" and was "mad" when Stenberg told him that he couldn't leave on Thursday. He also admitted that he had "cursed" Stenberg

and had used profanity, asserting, however, that Stenberg had also cursed him. But Roskopp could not "remember" what he had said or who had cursed first.

4. *The Increase In the Work Hours of Employees LaSala and Edwards*

During the first four months of 1965, the Company's business increased substantially. As a result, an hour was added to the shift of the night employees, so that they were working 11½ hours each shift. At the same time, all day shift employees, except a few females and employees Sam LaSala and Clyde Edwards, were working from 7:00 A.M. until 5:00 P.M. on weekdays, and from 7:00 A.M. until noon on Saturdays, for a total normal work week of 52½ hours. LaSala and Edwards, however, had been leaving work at 4:30 P.M. each weekday, and thus were working 2½ hours less per week than the other male day shift employees.

On March 9, 1965, Stenberg told LaSala and Edwards that they would have to work the same hours as everyone else—that is from 7:00 A.M. to 5:00 P.M. on weekdays. Stenberg testified that the change was effected because it was "wrong" that LaSala and Edwards had not been working the same number of hours during the "standard work week" as the Company's other male employees.

B. The Board's Decision and Order

In explanation of its conclusion that the prehearing interviewing of employees by the Company's attorneys violated Section 8(a)(1) of the Act, the Board, noting only that Plant Manager Stenberg was present and "participated," stated that the interrogation by counsel "went far beyond anything permissible for the legitimate preparation of their case." No other rationale was set forth. (App. 14a; 35a-37a). The Board's conclusion that the Company violated Section 8(a)(3) of the Act by its actions with respect to employees Brown, Roskopp, LaSala and Edwards was predicated on findings that the Com-

pany was motivated in its actions by antiunion considerations.

The Board's order, *inter alia*, required the Company to cease and desist from the unfair labor practices found, and to offer reinstatement to Brown and Roskopp with backpay for loss of earnings.

C. The Order and Judgment of the Court of Appeals

As stated, the court of appeals enforced the Board's order without opinion. The judgment of the court of appeals enlarged the Board's order by requiring the Company to reduce the work hours of employees LaSala and Edwards, if they consented.

REASONS FOR GRANTING WRIT

1. The issues raised by this certiorari petition—whether, and under what circumstances, an employer may, through attorneys, interview and interrogate it employees in order to prepare a defense to charged unfair labor practices—is extremely important in the interpretation and administration of the National Labor Relations Act. These are matters of vital significance to employers who may be charged with the commission of unfair labor practices;[3] to employees whose rights under the Act may be affected by employer action; to labor organizations with interests frequently aligned with employee interests; and to the Board itself which frequently must achieve a "delicate balance" between the employer's need to prepare adequately for pending unfair labor practice cases and the possible coercive nature of employer interrogation of employees during a labor dispute. See *International Union, United Automobile, Aerospace and Agricultural Imple-*

[3] The Board's most recently issued annual report shows that during the fiscal year ending on June 30, 1969, charges were filed against employers in 12,002 NLRB cases, and formal complaints against employers were issued in 1,492 NLRB cases. *Thirty-fourth Annual Report of the National Labor Relations Board*, pp. 199-200.

ment Workers of America v. *N.L.R.B.*, 392 F.2d 801, 809 (D.C. Cir. 1967), *cert. denied*, 392 U.S. 906 (1968).

2. The decision of the court below appears to be predicated on reasoning in conflict with the reasoning set forth by the Court of Appeals for the Fifth Circuit in its decision in *N.L.R.B.* v. *Ambox, Incorporated*, 357 F.2d 138, 141 (5th Cir. 1966). Because the court below issued no opinion, the rationale of its decision is obscured. The court, however, affirmed the Board's finding that the prehearing interrogation by Company counsel "went far beyond anything permissible for the legitimate preparation of their case," and thus the court necessarily gave its approval to the Board's rationale.

Although the Board permits an employer to interrogate employees in order to investigate facts concerning issues raised in a complaint and to prepare its case for trial, the privilege has been carefully circumscribed by the Board with so-called "safeguards." The Board thus set forth the limitations on the privilege in *Johnnie's Poultry Co.*, 146 NLRB 770, 775 (1964):

> . . . an employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees. When an employer transgresses the boundaries of these safeguards, he loses the benefits of the privilege.

The District of Columbia Circuit, the court below, has expressly approved the standard established by the Board in the *Johnnie's Poultry* case. In *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America* v. *N.L.R.B.*, *supra*, 392 F.2d

at 809 (D.C. Cir. 1967), that court quoted with approval the language set forth above from *Johnnie's Poultry* with respect to "safeguards," and concluded that "in this case some of these safeguards were conspicuously absent." Similarly, in *Amalgamated Clothing Workers of America* v. *N.L.R.B.*, 424 F.2d 818, 825 (D.C. Cir. 1970), the court again quoted the "safeguards" language of *Johnnie's Poultry*, and held that the Board did not unreasonably conclude "that in the absence of 'specific safeguards' [an employer] questionnaire was inherently coercive."

It thus appears that the court below, like the Board, has privileged prehearing employer interrogation of employees only under limited circumstances, and only if the "safeguards" test of *Johnnie's Poultry* has been satisfied. The standard of the court below appears, moreover, to assume that employer interrogation of employees is, of itself, coercive, but that fairness to the employer requires that a limited amount of such questioning be permitted. See *Joy Silk Mills* v. *N.L.R.B.*, 185 F.2d 732, 743 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951).

By contrast, the Fifth Circuit applies a more lenient standard—one that does not embrace the "safeguards" tests of *Johnnie's Poultry*. Thus in *N.L.R.B.* v. *Ambox, Incorporated*, 357 F.2d 138, 141 (5th Cir. 1966)—which was decided some two years after *Johnnie's Poultry*—the focus of the court's inquiry was limited to the narrow question of whether the interrogation had gone beyond the issues raised by the unfair labor practice complaint. The court said (357 F.2d at 138):

> There is no doubt that where an employer has a legitimate cause to inquire, he may exercise the privilege of interrogating employees on matters involving their Section 7 rights without incurring Section 8(a)(1) liability. Did the interrogation here go beyond that legitimately necessary for the preparation of respondent's defense? We think not. The inquiry did not delve into union matters *beyond* the limits of the issues raised by the complaint.

Accord: Texas Industries Inc. v. *N.L.R.B.*, 336 F.2d 128, 133-134 (5th Cir. 1964); *N.L.R.B.* v. *Guild Industries Manufacturing Corp.*, 321 F.2d 108, 112-113 (5th Cir. 1963). See also *N.L.R.B.* v. *National Survey Service, Inc.*, 361 F.2d 199, 206-207 (7th Cir. 1966).[4] The standard of the Fifth Circuit, moreover, unlike that of the District of Columbia Circuit appears, to be predicated on the view that employer interrogation of employees is not *per se* coercive. See *Bourne* v. *N.L.R.B.*, 332 F.2d 47, 48 (2nd Cir. 1964); *N.L.R.B.* v. *Lorben Corp.*, 345 F.2d 346, 348 (2nd Cir. 1965); *N.L.R.B.* v. *Gladding Keystone Corp.*, 435 F.2d 129, 132 (2nd Cir. 1970).

In sum, a conflict exists between the District of Columbia and Fifth Circuits with respect to the standard to be applied in adjudicating cases involving prehearing interrogation of employees by employers. It is submitted that this Court should, in this case, resolve the conflict in view of the importance and recurrent nature of the problem thus presented.

3. Even under the stringent standard established by the Board in the *Johnnie's Poultry* case, *supra*, as applied by the court below in *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America* v. *N.L.R.B.*, *supra*, and in *Amalgamated Clothing Workers of America* v. *N.L.R.B.*, *supra*, the prehearing interviewing of employees by the Company's attorneys was clearly privileged.

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[4] It is arguable that the Eighth Circuit has also rejected the "safeguards" standard of the Board's *Johnnie's Poultry* decision. Refusing to enforce the Board's finding of a violation in the latter case, the court, in *N.L.R.B.* v. *Johnnie's Poultry Co.*, 344 F.2d 617, 619 (8th Cir. 1965), said: "With respect to the interviewing of employees, we have examined the record, the Examiner's report and the Board's decision, and without detailed discussion, we state that we are of the view that the Board's determination on this issue is not supported by substantial evidence. The facts are adequately set out in the Examiner's report which resulted in his conclusion, reading: 'On all the evidence I find the interviews were confined to matters well within the scope of the amended charge and the complaint and were neither illegal nor coercive.'"

The questions addressed to the employees by the Company's attorneys were confined to matters well within the scope of the complaint against the Company. Thus the Section 8(a)(5) allegation of the complaint placed in issue the Union's status as majority representative, which, in turn, raised issues with respect to the authorization cards upon which the Union's majority status depended. Questions pertaining to employee signatures on authorization cards, as well as the circumstances surrounding the signing of the cards, were therefore clearly relevant to issues raised by the complaint. Consequently, in preparing for the hearing, the Company's attorneys were privileged to interview employees about these matters. *Joy Silk Mills* v. *N.L.R.B.*, *supra; N.L.R.B.* v. *Johnnie's Poultry Co.*, 344 F. 2d 617, 618-619 (8th Cir. 1965); *Madison Brass Works, Inc.*, 161 NLRB 1206, 1211 (1966); *Kintner Bros. Inc.*, 167 NLRB 57, 64 (1967).

Similarly, the questions asked employee LaSala about the change in his working hours and the matter of Company surveillance of a Union meeting pertained to Section 8(a)(3) and 8(a)(1) issues raised by the complaint. The interviewing was therefore privileged. *Atlantic and Pacific Tea Company*, 138 NLRB 325, 334 (1962); *S. S. Logan Packing Company*, 152 NLRB 421, 423, 425-426 (1965); *Montgomery Ward & Co., Inc.*, 146 NLRB 76, 79-80 (1964); *May Department Stores Co.*, 70 NLRB 94, 95 (1946).

The interviewing of employee Kruse concerning his prehearing questioning by the Board was likewise privileged. Although Kruse was asked by the Company's attorneys whether he had been questioned by the Board and what the Board attorney had questioned him about, Kruse was *not* asked how he had answered, what he had said, or to reveal the contents of any statement he had given to the Board. Accordingly, the interviewing of Kruse did not violate the Act. *Texas Industries Inc.* v. *N.L.R.B.*, *supra*, 336 F.2d at 134; *Montgomery Ward & Co., Inc.*,

146 NLRB 76, 79-80 (1964); *Lipman Bros. Inc.*, 147 NLRB 1342, 1368-1369 (1964); *Murray Ohio Manufacturing Company*, 156 NLRB 840, 848, n. 28 (1966); *Bishop and Malco, Inc., d/b/a Walker's*, 159 NLRB 1159, 1161 (1966).

That the employees who were thus interviewed had also been subpoened by the Board to testify in the approaching unfair labor practice hearing, is not material. See *Huttig Sash & Door Company, Inc.*, 154 NLRB 1567 (1965); *Madison Brass Works, Inc.*, 161 NLRB 1206, 1211 (1966); *Kintner Bros. Inc.*, 167 NLRB 57, 64 (1967). See also *Imco Container Company*, hearing. Moreover, as required by the rule of *Johnnie's Poultry, supra*, the interviews of the Company's employees were voluntary and were conducted in an atmosphere free from employee hostility. Thus the employees were told that they did not have to answer any questions put to them, the employees were not "pressured", and there was "laughing and joking" during the interviews, and no "unpleasantries".

Nor does the single reason assigned by the Board to support its finding of a violation—that Plant Manager Stenberg was also present at these conferences with employees and participated in the questioning—carry weight. Factually, Stenberg's participation in the interviewing was confined to introducing the employees to the Company's attorneys, and to informing the employees that the attorneys would like to ask a few questions. Moreover, the rule priviliging interviewing to prepare for trial is not limited to interviewing by an employer's counsel; it extends to the employer generally. *Joy Silk Mills* v. *N.L.R.B., supra; Suprenant Manufacturing Co.* v. *N.L.R.B.*, 341 F. 2d 756, 762 (6th Cir. 1965). Thus, as originally promulgated by the Board, the rule extended to an employer and, derivatively, to the employer's counsel. *May Department Stores*, 70 NLRB 94, 95 (1946). The rule has since in fact been applied by the Board to privilege questioning by employer representatives who

were not attorneys. *Murray Ohio Manufacturing Company*, 156 NLRB 840, 847-848, n. 28 (1966). And the Board has in fact applied the rule to privilege interviewing by an attorney in the presence of high managerial officials (employer's store manager and district manager) who were not attorneys. *Montgomery Ward & Co., Inc.*, 146 NLRB 76, 79-80 (1964).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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